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THE HONORABLE
JOHN C. COUGHENOUR

7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 NO. CV06-0204JCC

11 JAMES S. GORDON, Jr., a married
individual, d/b/a
'GORDONWORKS.COM';

12 Plaintiff,

13 v.

14 VIRTUMUNDO, INC, a Delaware
corporation, d/b/a
ADNOWLEDGEEMAIL.COM;
15 ADKNOWLEDGE, INC., a Delaware
corporation, d/b/a
ADKNOWLEDGEEMAIL.COM;
16 SCOTT LYNN, an individual; and
17 JOHN DOES, I-X,

18 Defendants,

19 PLAINTIFF'S RESPONSE IN OPPOSITION
20 TO DEFENDANTS' MOTION TO DISMISS

21 [Hearing Noted Without Oral Argument for
22 April 7, 2006]

23 [JURY DEMANDED]

24 Plaintiff James S. Gordon, Jr., by and through his attorney of record, responds to Defendants'

25 Motion To Dismiss as follows:

26
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OPPOSITION TO
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I. Introduction

Defendants seek to dismiss Plaintiff's Complaint against them, claiming lack of personal jurisdiction pursuant to CR 12(b)(2). Plaintiff asserts that personal jurisdiction clearly attaches to Defendant in the State of Washington. To hold differently would effectively eviscerate the Washington CEMA (RCW 19.190 et seq.) by preventing Washington citizens as well as the State Attorney General from applying the State's anti-spam laws to out-of-state spammers, such as Defendant here.

This case illustrates the evolving nature of the law of personal jurisdiction in response to new developments in technology. The trend in recent years has become quite clear, indicating that courts around the country, and in particular Washington courts, both state and federal, have been holding in favor of personal jurisdiction in cases involving contacts, including commercial emails, via the internet. (See Declaration of Robert J. Siegel and decisions attached thereto, including: two decisions by this Court, Judge Thomas Zilly at Exhibit "A"; two recent decisions from the U.S. Eastern District court of Washington at Exhibit "B"; a motion and decision from the Washington Superior Court For King County, Judge Hilyer, denying a similar motion to dismiss by this same Defendant, Virtumundo, as Exhibit "C"). Defendants' arguments are wholly without merit.

Facts

(For a complete statement of the facts discussed herein See *Subjoined Declaration of James S. Gordon, Jr.*)

On September 8, 2003, Plaintiff Gordon received a commercial email from Defendant Virtumundo with the subject line “NFL Sunday Ticket and 4 Free Months of DirecTV”

1 purportedly advertising satellite television subscriptions for sale over the internet, and
 2 containing, in fine print, the misrepresentation that "You received this email because you signed
 3 up at one of Virtumundo's websites...", an allegation that Plaintiff wholly denies. This email
 4 was sent to his "james@gordonworks.com" email address, at his domain Gordonworks.com.
 5

6 Mr. Gordon, as he routinely does, replied to the email and informed Defendants that he
 7 was a Washington State resident, and to cease and desist sending any further email.
 8 Subsequently, and incredibly, Mr. Gordon received over 6,000 more emails from Defendants at
 9 this email address, transmitted to and through his interactive computer service, and through his
 10 LLC's domain server. (Mr. Gordon's LLC, Omni Innovations, LLC has been added as a party
 11 plaintiff to this lawsuit by the filing of a First Amended Complaint concurrently herewith, a copy
 12 of which is attached to the subjoined Declaration of Robert J. Siegel).
 13

14 Many of the offending emails contained a statement claiming that he had "subscribed" to
 15 receive commercial email, and that if he did nothing further, he would begin receiving more
 16 commercial email from Virtumundo. In response, Mr. Gordon sent an email to Virtumundo,
 17 informing it that he was a Washington State resident, that the email was in violation of RCW
 18 19.190 and RCW 19.86, and requested that Virtumundo cease and desist sending all email, either
 19 sent by Virtumundo or by anyone else on its behalf. The email also included a list of all email
 20 addresses owned by Mr. Gordon, and specified that if Virtumundo continued sending him email,
 21 it agreed to submit itself to the jurisdiction and venue of the courts of Washington. This email
 22 did not "bounce," indicating that Virtumundo received the email.
 23

24 Mr. Gordon subsequently sent numerous other cease and desist emails to Virtumundo,
 25 including the same message, literally thousands of times! Despite the repeated notices and

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1 warnings sent to Defendants, instead of ceasing and desisting its commercial email campaign to
 2 Mr. Gordon as he requested, Virtumundo continued to send email after email to him, advertising
 3 a wide array of products and services. *See Declaration of James Gordon.* The notices sent by
 4 Mr. Gordon to Defendants were much clearer and specific than would be a questionable request
 5 to “unsubscribe”¹.
 6

7 After his numerous attempts failed to stop the flow of unsolicited email from Defendants,
 8 Mr. Gordon served Defendants with this lawsuit.
 9

10 As is apparent from the declarations submitted in support of Defendants’ Motion, and
 11 notwithstanding the objectionable nature of same, Defendants admit to selling goods and services
 12 through commercial email transmitted through the internet, and nowhere do they flatly deny that
 13 Plaintiff received the emails in question from them. Nonetheless, Defendants make the untenable
 14 claim that they have not subjected themselves to the jurisdiction of the Washington courts
 15 because they do not have the requisite “minimal contacts” with this State, and/or “purposeful
 16 availment” on their behalf cannot be established. Plaintiff submits that, in light of the well-
 17 established law in this area, as set forth below, such a position is specious, and borders on the
 18 frivolous!
 19

II. Argument and Authority

A. The Court Should Consider Only Plaintiff’s Factual Allegations.

20 When a district court acts on a defendant’s motion to dismiss under Rule 12(b)(2) without
 21 holding an evidentiary hearing, the plaintiff need make only a prima facie showing of
 22

23
 24 ¹ Plaintiff notes that the use of the term “unsubscribe” implies that he “subscribed” to receive
 25 unlawful email in the first place, which Mr. Gordon categorically denies having done.
 26

jurisdictional facts to withstand the motion to dismiss. Ballard v. Savage, et al., 65 F.3d 1495 (1995). “[T]he plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant.” Id., citing Data Disc, Inc. v. Systems Technology Assos., 557 F.2d 1280, 1285 (9th Cir. 1977). The facts are viewed in the light most favorable to the Plaintiffs. Compuserve Inc. v Patterson, 89 F.3d 1257, 1262, (6th Cir. 1996), citing Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991). “Furthermore, a ‘court disposing of a 12(b)(2) motion *does not weigh* the controve^rt^rting assertions of the party seeking dismissal,’ … because we want ‘to prevent non-resident defendants from regularly avoiding personal jurisdiction simply by filing an affidavit denying all jurisdictional facts.’ Id at 1459 (emphasis added). Dismissal in this procedural posture is proper only if *all* the specific facts which the plaintiff alleges collectively fail to state a prima facie case for jurisdiction. Id. Unless directly controverted, the plaintiff’s version of the facts is taken as true. Doe v. Unocal, Corp., 248 F. 3d 915, 922 (9th Cir. 2001). Conflicts in the evidence set forth in the parties’ affidavits must be resolved in the plaintiff’s favor. Id. Here, Plaintiff has clearly met his burden, and Defendant’s Motion should be dismissed.

B. The Statements Of Defendants’ Corporate Counsel Should Be Stricken

And/Or Ignored. It likely has not gone unnoticed by the Court that the only sworn statements submitted on behalf of both defendants are not from corporate officers, but rather from their respective corporate counsel, Messrs. Geroe and Brandt. Notwithstanding the highly unusual, and unreliable nature of such testimony, the Court should take particular notice of the fact that nowhere in the Defendants’ brief (nor in the sworn statement of Defendant Virtumundo’s corporate counsel) does the Defendant ever deny sending spam to Mr. Gordon. This omission is

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1 particularly telling given the fact that the entire basis of the Plaintiff's complaint is the allegation
2 that the Defendant sent thousands of unsolicited, and otherwise unlawful emails to Mr. Gordon.
3 Instead, the Defendant's counsel simply ignores the issue, essentially arguing that "there was no
4 intentional contact by Defendant with anyone in Washington State", and that they, Defendants,
5 intentionally don't target Washington residents (while claiming they can't ascertain the actual
6 location of the email addresses they regularly send commercial emails to), as if the thousands of
7 Defendant's illegal spams were not "contacts", and were not "intentional".
8

As this Court is well aware, *intent* has nothing to do with the issue, and is nowhere required in order to violate the Washington CEMA. The sworn testimony of the Defendant's corporate counsel is also glaringly equivocal, admitting that a certain amount of their revenue is indeed derived from transactions/sales in Washington, while disingenuously attempting to minimize that admission by stating an unsupported, and uncertified revenue figure completely out of context, i.e., the actual dollar amounts derived from Washington transactions. Thus, we have no way to know just how many dollars .04%, and .16% of Defendants' revenue these percentages actually represent. Nonetheless, for these purposes, it matters not whether these numbers represent millions of dollars, or mere pennies. Neither Defendants' *intent* nor their revenue is relevant to the determination of whether this Court may exercise personal jurisdiction over them.

20 Notwithstanding the foregoing, Plaintiff moves this Court to ignore the factual allegations
21 made by “*Defendant’s Motion*” and strike the allegations contained within the attached affidavits
22 upon which its entire motion is necessarily, albeit improperly, founded, and consider only the
23 collective claims made by Plaintiff: here, in the subjoined Declarations, attached exhibits, and in
24 his Complaint and First Amended Complaint.

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1
2 **C. Plaintiff's Prima Facie Facts Clearly Support Personal Jurisdiction.**

3 In Washington, a traditional analysis of jurisdiction under its long-arm statute involves two
4 separate issues: (1) does the statutory language purport to extend jurisdiction, and (2) would
5 imposing jurisdiction violate constitutional principles. Grange Insurance Association v.
6 Washington, 110 Wn.2d 752, 757 P.2d 933 (1988), citing Werner v. Werner, 84 Wn.2d 360, 364,
7 526 P.2d 370 (1974).

8
9 **1. Statutory authority**

10 Plaintiff alleges that the Defendant engaged in conduct in violation of RCW 19.190 et
11 seq., the Washington Commercial Electronic Mail Act (CEMA). Long arm jurisdiction under this
12 act is specifically granted under RCW 3.66.020. Plaintiff's First Amended Complaint also adds
13 allegations and causes of action under: The Federal Can-Spam Act of 2003, 15 U.S.C. §7701, *et*
14 *seq*; the Washington State Identity Crimes Act, RCW 9.35 et seq.; the Washington Deceptive
15 Offers Act, RCW 19.170 et seq.; and for Injunctive Relief.

16 Further statutory authority is granted pursuant to RCW 19.86, which provides that
17 violations of the CEMA statute constitute *per-se violations* of the Consumer Protection Act.
18 Under RCW 19.86.160, persons who fall within the service provisions of the CPA are "deemed to
19 have thereby submitted themselves to the jurisdiction of the courts of this state within the
20 meaning of RCW 4.28.180 and RCW 4.28.185."

21 Thus, Washington's long arm statute clearly extends jurisdiction over the Defendant
22 through the Consumer Protection Act. (*See State v. Readers Digest Association*, 81 Wn. 2d 259,
23 277 (1991), which held that the performance of an unfair trade practice in Washington, even
24 25

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1 though by a foreign corporation which had no agents, employees, offices or property in the state,
 2 was *alone* sufficient to establish jurisdiction.)

3 Further statutory authority is extended by RCW 4.28.185(b), which extends jurisdiction
 4 over persons who commit tortious acts in Washington. Federal Courts have ruled that sending
 5 unsolicited email constitutes the common law tort of trespass to chattels. *America Online Inc. v.*
 6 *LCGM Inc.*, 46 F. Supp. 2d 444, 451-452 (E.D. VA, 1998). Washington State courts have ruled
 7 that deceptive acts of consumer fraud of the type addressed under the CPA may constitute
 8 “tortious” acts for the purposes of extending long-arm jurisdiction over an out of state defendant.
 9 Authority is also extended by RCW 4.28.185(a), which extends jurisdiction over any person who
 10 transacts business within this state. Further, in addition to the many thousands of unlawful
 11 commercial email solicitations received by Plaintiff, it is expected that discovery will reveal the
 12 extent of Defendants’ true business transactions in this State, and will show substantial sales that
 13 Defendants have made in the State of Washington. (Defendants have already admitted that they
 14 do transact business on the internet in this State by virtue of statements contained in their
 15 supporting Affidavits indicating that a percentage of their sales, albeit an unspecified amount, are
 16 to Washington residents).

17 **2. Due process**

18 The Ninth Circuit employs a three-part test to determine if a district court can exercise
 19 specific jurisdiction:

- 20 (1) The nonresident defendant must do some act or consummate some transaction with
 21 the forum or perform some act by which he purposefully avails himself of the
 22 privilege of conducting activities in the forum, thereby invoking the benefits and
 23 protections of its laws; (2) the claim must be one which arises out of or results from
 24 the defendant's forum-related activities; and (3) exercise of jurisdiction must be

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1 reasonable.

2 Panavision v. Toeppen, 141 F.3d 1316, 1320 (1998).

4 (a) **The First Element - Purposeful Availment.**

5 The purposeful availment requirement ensures that a nonresident defendant will not be
 6 hauled into court based upon "random, fortuitous or attenuated" contacts with the forum state.
 7 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985).
 8 This requirement is satisfied if the defendant "has taken deliberate action" toward the forum state.
 9 Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995). "Fulfilling this step is not necessarily
 10 precluded by a lack of physical contacts with the forum. Rather, 'within the rubric of 'purposeful
 11 availment' the [Supreme] Court has allowed the exercise of jurisdiction over a defendant whose
 12 only 'contact' with the forum state is the 'purposeful direction' of a *foreign* act having *effect* in the
 13 forum state.'" Core-Vent Corp. v. Nobel Industries, 11 F.3d 1482, 1485, (1993), citing Haisten v.
 14 Grass Valley Medical Reimbursement Fund, 784 F.2d 1392, 1397 (9th Cir. 1986). The "effects
 15 test" was established in Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) in
 16 which the Supreme Court held that the inquiry into whether a defendant purposefully availed
 17 itself on the forum state slightly shifts when the application turns on a tort claim.
 18

19 Defendant relies heavily on Cybersell v. Cybersell, 130 F.3d 414 (1997) arguing that
 20 somehow the purposeful transmission of thousands (and likely millions) of commercial emails is
 21 the equivalent of operating a passive advertisement on a website (the act in question in
 22 Cybersell). While passive internet advertising alone may not be sufficient to subject a party to
 23 jurisdiction in another state, when that party "purposefully (albeit electronically) directed his
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1 activity to the forum state,” such is considered “something more” and sufficient to satisfy the
2 purposeful availment requirement. Panavision, at 1321, citing Cybersell Inc. v. Cybersell Inc.,
3 130 F.3d 414 (9th Cir. 1997), and cases attached in Exhibit “A”. Numerous courts have found
4 that email is in fact just such a “purposeful” act, as the sender must affirmatively enter the
5 recipients address into a program, formulate a message, and direct the message to the targeted
6 address by pushing a “send” button, or by affirmatively and purposefully programming specific
7 software to accomplish those acts.
8

In any event, Defendant's ownership and operation of a website advertising its spamming abilities is not alleged as the basis for jurisdiction here. It makes no difference whatsoever whether Defendants' websites are "active" or "passive," or whether Defendants even operate a website at all. It is the intentional and purposeful direction of thousands of emails to Plaintiff, particularly after repeated, direct notices to cease and desist that constitutes purposeful availment here.

The fact that Mr. Gordon gave direct notice to Virtumundo to cease and desist is further dispositive here. The U. S. Supreme Court has held in the context of junk mail that a mailer's right to communicate is circumscribed by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer. Rowan v. U.S.P.S., 397 U.S. 728, 737, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970). They noted the importance of the long held right of "a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property." *Id.*, citing Hall v. Commonwealth, 188 Va. 72, 49 S. E. 2d 369, appeal dismissed, 335 U.S. 875 (1948). Chief Justice Burger in his opinion stated:

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